No. 18239

In the United States Court of Appeals for the Ninth Circuit

S. H. KRESS & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review And On Cross-Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

JAMES C. PARAS,
STEPHEN B. GOLDBERG,
Attorneys,

National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

Cases—Continued Page

Cases—Continued

Statute:

Miscellaneous: Page

In the United States Court of Appeals for the Ninth Circuit

No. 18239

S. H. KRESS & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review And On Cross-Petition for Enforcement of An Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of S. H. Kress & Co. to review an order (R. 16-26)[1] of the National Labor Relations Board, issued against it on July 11, 1962, following proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et*

[1] References to the pleadings reproduced as "Pleadings, Volume I" are designated "R." References preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

seq.).[2] In its answer the Board requests enforcement of its order.

The Board's decision and order are reported at 137 NLRB No. 126. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at petitioner's retail store in Stockton, California.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that petitioner, by engaging in systematic interrogation of its employees as to their Union[3] membership, and by seeking to induce employees who admitted to having signed Union authorization cards to revoke such authorization, had violated Section 8(a)(1) of the Act. The relevant underlying facts, all of which have been stipulated by the parties (R. 8-14),[4] are as follows:

On August 2,[5] the Union filed a petition with the Board's Regional Office in San Francisco, seeking a

---

[2] The pertinent provisions of the Act are set forth *infra*, pp. .

[3] Teamsters, Chauffeurs, Warehousemen & Helpers, Local 439, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

[4] The parties, in addition to entering into a stipulation of facts, waived their right to a hearing before a Trial Examiner, and jointly moved to transfer proceedings directly to the Board for findings of fact, conclusions of law, and decision and order. The Board granted the joint motion (R. 15, 16-17).

[5] All dates herein are 1961.

representation election in a 60-employee unit at petitioner's store in Stockton, California. On September 12, after negotiations for a consent election had proved fruitless, the Regional Director of the Board issued a notice that a hearing would be held on September 27 on the Union's petition for an election (R. 17-18; 9).

On September 15 and 16, petitioner's store manager, Glenn E. Greenbank, and its labor relations representative, Charles G. Barry, interviewed 46 of the employees in the proposed unit. Each employee was called separately into a storeroom area and there interviewed by Greenbank and Barry. The interviews were conducted during working hours and the employees were paid for the time spent at the interview. (R. 18; 9-10). In the course of the individual interviews, each employee was told that petitioner wanted to determine whether the Union had obtained the signatures of enough employees, 30 percent of those in the proposed unit, to support its petition.[6] Each employee was assured that his job was not endangered and that he could speak freely. Each was told that it was not petitioner's intention to inquire into his feelings for or against the Union, that he was under

---

[6] The Board has long followed the practice of requiring a petitioning union to make a *prima facie* showing of at least 30 percent representation in the proposed unit as a condition precedent to the conduct of a representation election. See National Labor Relations Board Rules and Regulations and Statements of Procedure Series 8, Section 101.17-101.18 (Appendix A to petitioner's brief); see also *N.L.R.B.* v. *J. I. Case Co.*, 201 F. 2d 597, 598-600 (C.A. 9).

no obligation to discuss those feelings, that he was not required to furnish any information to petitioner, and that he was free to leave at any time. (R. 18; 10.)

Each employee was then handed a mimeographed form, which read as follows:

S. H. KRESS & Co.

Stockton, California

I have not signed a card for the union to represent me as an employee of S. H. Kress & Co.

Dated ..... Signed .....
(Employee)

Each employee was asked to read the form, and was told that he could sign it or not as he wished; that the matter was confidential and would not affect his job. Forty employees signed such forms. One stated she had not signed an authorization card, but would not sign the form. Five, upon stating that they had signed authorization cards, were asked by petitioner if "they were sure what it meant." All replied that they did not, whereon petitioner suggested that if they wished to revoke their authorizations, they could so indicate on the mimeographed form. Four did so, signing the form and adding the following statement on the bottom: "I signed a card but would like to have it revoked." One signed and added: "At the time I signed the card I was unaware of the purpose of the card." During the interviews, petitioner expressed no opinion about the Union, or union organization, and none of the employees made any protest

or indicated any objection to any statements made or questions asked. (R. 18-19; 10-11.)[7]

On September 19, Barry forwarded the 45 signed forms to the Regional Director, requesting him to reinvestigate the Union's showing of interest. The Regional Director did so and concluded that some of the signed forms obtained by the Company during the systematic interrogation of its employees were false. Accordingly, the Regional Director notified the Company that the Union's showing of interest was adequate and proper. Subsequently, on October 26, upon charges previously filed by the Union, the Regional Director issued a complaint, alleging that petitioner had violated Section 8(a)(1) by its interrogation of September 15 and 16 (R. 19; 11-12).[8]

II. The Board's conclusions and order

On the foregoing facts the Board concluded that by interrogating employees as to their union membership, and by seeking to induce employees who ad-

---

[7] According to petitioner, the above-described interviews took place after approximately 13 employees had voluntarily reported to Greenbank and other supervisors that they did not believe that 30 percent of the employees had signed authorization cards (R. 19-20; 11).

[8] On August 9, the Union had filed charges with the Board, alleging that petitioner had engaged in unlawful interrogation of its employees. Those charges were withdrawn on August 24, with the approval of the Regional Director (R. 17; 9). On September 25, the Regional Director notified all the parties that: "Upon the basis of newly discovered evidence, the withdrawal request heretofore approved August 24, 1961, is hereby revoked and the case is reopened for further investigation." (R. 19; 12.)

mitted to having signed union authorization cards to revoke such authorization, petitioner had interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7, thereby violating Section 8(a)(1) of the Act (R. 24). The Board's order requires petitioner to cease and desist from the unfair labor practices found and from like or related violations of the Act. Affirmatively, the Board's order requires petitioner to post appropriate notices (R. 24-25.)

ARGUMENT

THE BOARD PROPERLY FOUND THAT PETITIONER UNLAWFULLY INTERROGATED ITS EMPLOYEES AND SOUGHT TO INDUCE THEM TO REVOKE UNION AUTHORIZATION CARDS, THEREBY VIOLATING SECTION 8(a)(1) OF THE ACT

A. Petitioner's conduct violated Section 8(a)(1) of the Act

The fundamental purpose of the National Labor Relations Act is to encourage collective bargaining and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 7 implements this purpose by guaranteeing employees the "right" to engage in such activity and Section 8(a)(1) enforces the guarantee by declaring it to be an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the

exercise of their rights under Section 7. The language and legislative history of Section 8(a)(1) show that Congress intended the terms "interfere," "restrain," and "coerce" to have separate and distinct meanings.[9] In banning "interference" Congress clearly meant to proscribe any employer activity which would tend to limit employees in the exercise of their statutory rights.[10] No actual interference with employee rights need be shown to make out a violation of Section 8(a)(1). "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *N.L.R.B.* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). See also *N.L.R.B.* v. *Ford*, 170 F. 2d 735, 738 (C.A. 6); *N.L.R.B.* v. *Syracuse Color Press*, 209 F. 2d 596, 599 (C.A. 2), cert. den., 347 U.S. 966; *Time-O-Matic*,

---

[9] See Senate Committee on Education and Labor, Hearings on S. 1958, 74th Cong., 1st Sess. (1935) pp. 713-714, 558; 305; H.R. No. 245 on H.R. 3020, 80th Cong., 1st Sess. (1947) p. 28.

[10] Looking back after 4 years of experience under the Wagner Act, at a time when amendments to Section 8(a)(1) were urged but not adopted, Senator Wagner made this observation on the need for continuing the prohibition against interference:

> The ban against "interference" has been of central importance in protecting the right to organize . . . since it embraces a multitude of activities which would not be reached by specific prohibitions written into law, and would not be included within the range of such narrower concepts as "restraint" or "coercion." 84 Cong. Rec., 76th Cong., 1st Sess. (1939) A. 2053.

Inc. v. *N.L.R.B.*, 264 F. 2d 96, 99 (C.A. 7); *Blue Flash Express*, 109 NLRB 591, 593. Accord, *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 588, 599.[11]

Employees can exercise fully their statutory right to engage in self-organizational and other concerted activity only if they are free from employer prying and investigation. For, when an employer inquires into organizational activity, whether by surveillance or direct questioning, the employee who is interrogated or watched will naturally fear that the employer not only wants information on the nature and extent of his union interests and activities, but also contemplates some form of reprisal once the information is obtained. Thus, as this Court has noted, "Interrogation as to union sympathy and affiliation has been held

---

[11] Similarly, evidence of unlawful intent on the part of the employer is not a necessary element of proof of violation of Section 8(a)(1). "It is the effect and not the motivation of [petitioner's] action which determines whether he has violated Section 8(a)(1)." *N.L.R.B.* v. *Price Valley Lumber Co.*, 216 F. 2d 212, 215 (C.A. 9). Thus, petitioner's assertion (Brief, pp. 17-23) that the evidence does not show that it interrogated its employees for an unlawful purpose is, even if correct, irrelevant. Nor is it made relevant by the allegation in the complaint that the purpose of petitioner's interrogation was to undermine the Union and to interfere with, restrain or coerce its employees. For, in this context, it is plain that an allegation of unlawful motive on petitioner's part means no more than that the natural consequence of its interrogation was to interfere with its employees' rights under the Act. "This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . ." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 45.

to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 904. "Whether the company would be disposed to make such use of the [information] is beside the point. As long as the opportunity is present, employees may have a real fear that this would be done." *N.L.R.B.* v. *Essex Wire Corp. of Calif.*, 245 F. 2d 589, 592 (C.A. 9).

That petitioner's conduct in the instant case would tend to create such a fear in its employees, and so interfere with their rights of self-organization, is clear. Petitioner systematically inquired of 46 employees as to whether each had signed a union card by soliciting the signature of each to a mimeographed form stating that the employee had not signed such a card. The very wording of the form, inviting as it did, a plainly negative response, made petitioner's antiunion animus plain to the employees. Cf. *N.L.R.B.* v. *California Compress Co.*, 274 F. 2d 104, 106 (C.A. 9). Forty of the employees signed the mimeographed forms, though it was later determined that some of them had signed union authorization cards (R. 22, 19; 11); this alone is some indication of the fear engendered in the employees that petitioner's questions were but the prelude to retaliatory activity. See *N.L.R.B.* v. *Syracuse Color Press*, 209 F. 2d 596, 599-600 (C.A. 2), cert. den., 347 U.S. 966. Moreover, when five of the employees admitted having signed union cards, petitioner sought to induce them to revoke such cards, thus

reemphasizing its opposition to union organization.[12] Finally, it should be noted that the interrogators were not minor supervisory employees, but petitioner's store manager and its labor relations representative. The participation of such high managerial representatives in the interrogation is a potent factor in creating the "aroma of coercion" condemned in the Act. *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 740 (C.A.D.C.), cert. den., 341 U.S. 914. See also *N.L.R.B.* v. *Syracuse Color Press, supra,* at 599. In sum, we submit that the systematic interrogation of employees as to their union membership, by representatives of high management, in circumstances which belie the employer's professed unconcern with the union affiliation of its employees, infringes upon the employees' right to privacy in their union affairs,[13] and is unlawful because of

---

[12] The Board found, in accord with settled law, that such inducement of employees to revoke union authorization cards previously signed by them was in and of itself a violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Howard-Cooper Corp.*, 259 F. 2d 558 (C.A. 9); *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258 (C.A. 9), cert. den., 348 U.S. 829; *N.L.R.B.* v. *United Biscuit Co.*, 208 F. 2d 52 (C.A. 8), cert. den., 347 U.S. 934; *N.L.R.B.* v. *Lovvorn,* 172 F. 2d 293 (C.A. 5); *N.L.R.B.* v. *Consolidated Machine Tool Co.*, 163 U.S. 376 (C.A. 2), cert. den., 332 U.S. 824.

[13] Though petitioner denies that employees have a right to privacy in their union affairs, the existence of such a right, as a necessary concomitant to the full and free exercise of the organizational rights guaranteed by Section 7 of the Act, has long been recognized. See *N.L.R.B.* v. *Grower-Shipper Vegetable Association of Central California, Inc.*, 122 F. 2d 368, 376, in which this Court found an employer to have violated the Act by surveillance of employee organizational activity, even though the employees involved were unaware

its "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket, supra.* See also *N.L.R.B.* v. *California Compress Co., supra; N.L.R.B.* v. *State Center Warehouse*, 193 F. 2d 156 (C.A. 9); *N.L.R.B.* v. *Syracuse Color Press, Inc., supra; N.L.R.B.* v. *F. H. McGraw & Co.*, 206 F. 2d 635 (C.A. 6); *Spartanburg Sportswear Co.*, 116 NLRB 1914, enf'd, 246 F. 2d 366 (C.A. 4).

This is not, of course, to say that any effort by an employer to ascertain the union sentiments of his employees will necessarily be violative of the Act. As this Court stated in *N.L.R.B.* v. *Roberts Brothers*, 225 F. 2d 58, 60, the question of whether a poll of employees as to their union affiliation is unlawful depends on the circumstances of each case. But in *Roberts*, in *N.L.R.B.* v. *Protein Blenders, Inc.*, 215 F. 2d 749 (C.A. 8), and in *N.L.R.B.* v. *Crystal Laundry*, 308 F. 2d 626 (C.A. 6), on all of which petitioner relies, the poll involved was a secret one. Here, each employee was interrogated individually,[14] and, fur-

---

of the surveillance, so that it could have had no restrictive effect on the continuance of such activity. See also *N.L.R.B.* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2); *N.L.R.B.* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 50 (C.A. 3); *Bethlehem Steel Co.* v. *N.L.R.B.*, 120 F. 2d 641, 647 (C.A.D.C.); *Premier Worsted Mills*, 85 NLRB 985, 986; *Virginia Electric and Power Co.*, 44 NLRB 404, 426, 427, enforced, 132 F. 2d 390 (C.A. 4), affirmed, 319 U.S. 533.

[14] We totally fail to understand petitioner's assertion (Brief, p. 38, n. 40) that a "private" or secret poll is more

thermore, the mimeographed form presented to each employee had "an anti-union sound about it." *N.L.R.B.* v. *California Compress Co.*, *supra*, at 106. The instant case is thus distinguishable from *Roberts*, *Protein Blenders*, and *Crystal Laundry*, and is much more akin to *California Compress* in which this Court found the Act to have been violated by the employer's circulation of, and effort to obtain signatures to, an affidavit denying that the signer had executed a union authorization card.[15]

B. Petitioner's defenses are without merit

Petitioner's assertion that its conduct was lawful under the Board's decision in *Blue Flash Express*, 109 NLRB 591, is wholly lacking in merit. In that case, the union involved had gone directly to the employer, claimed majority status, and requested the employer to bargain with it (*id.* at 592). The employer's sub-

---

likely to have a coercive effect than face-to-face questioning. The contrary assumption would appear far more warranted. See *California Compress, supra; N.L.R.B.* v. *Crystal Laundry, supra,* at 628; *N.L.R.B.* v. *Protein Blenders, Inc., supra,* at 751; *N.L.R.B.* v. *Colten,* 105 F. 2d 179, 181-182 (C.A. 6).

[15] An examination of the cases cited by petitioner on pages 26-31 of its brief shows that they differ factually from the instant case. By and large, they exemplify the casual, perfunctory interrogation by minor supervisory employees that comes within the doctrine of *Sax* v. *N.L.R.B.* (cited by petitioner as *Container Mfg. Co.* v. *N.L.R.B.*), 171 F. 2d 769 (C.A. 7), relied on by this Court in *Wayside Press* v. *N.L.R.B.*, 206 F. 2d 862. In none of those cases was there the systematic inquiry by high management officials here presented. See *N.L.R.B.* v. *Syracuse Color Press, Inc., supra,* at 599; *N.L.R.B.* v. *F. H. McGraw & Co., supra,* at 640.

sequent questioning of his employees for "a purpose which was legitimate in nature" (*id.* at 593), i.e., to determine whether the union did in fact represent a majority of his employees and accordingly whether he was legally obligated to recognize and bargain with the union, was held by the Board to be lawful. Here, on the other hand, petitioner was faced with no such bargaining demand, but merely with a petition for a representation election. Thus, even assuming that petitioner's ultimate purpose in interrogating its employees was, as it asserts, to determine the Union's majority status, that purpose does not serve to legitimize the interrogation. For in the absence of a direct claim of majority status and a demand that petitioner bargain with the Union, petitioner had no such pressing need to know whether the Union did in fact represent a majority of its employees that it could not await the results of the forthcoming representation election.[16] In brief, the rationale of *Blue Flash*—that an employer faced with a direct claim of majority status and a request for bargaining may legitimately question his employees to determine whether he must,

---

[16] A mere petition for a representation election is obviously not the same thing as a bargaining demand, nor do the cases cited by petitioner (Brief p. 4, n. 5) hold otherwise. The teaching of those cases is simply that the filing of a representation petition constitutes a statutorily sufficient demand for recognition to enable the Board to proceed under Section 9(c)(1) to investigate and determine whether a question of representation exists. *Tyree's, Inc.*, 129 NLRB 1500, n. 1. The filing of such a petition does not, however, obligate the employer to bargain with the petitioning union unless and until an election establishes its majority status.

as a matter of law, bargain with the union—is inapplicable here where the Union neither claimed majority status nor demanded that petitioner recognize and bargain with it.[17]

Nor may petitioner bring its conduct within *Blue Flash* by asserting that it had a legitimate concern with whether the Union had achieved a proper showing of interest. The Board's showing of interest rule was adopted as an administrative expedient to enable the Board to eliminate representation petitions with little or no prospect of success in order to avoid needless dissipation of the Government's time, effort, and funds in conducting representation elections in such circumstances. *O. D. Jennings & Co.*, 68 NLRB 516, 517-518; *N.L.R.B.* v. *J. I. Case Co.*, 201 F. 2d 597 (C.A. 9). An integral and long accepted concomitant of the showing of interest rule is the non-litigability of a petitioner's evidence as to such interest. *N.L.R.B.* v. *J. I. Case Co.*, 201 F. 2d 597, 599-600 (C.A. 9); *N.L.R.B.* v. *National Truck Rental Co.*, 239 F. 2d 422 (C.A.D.C.), cert. den., 352 U.S. 1016; *Kearney*

---

[17] Both *Bon-R Reproductions, Inc.* v. *N.L.R.B.*, 309 F. 2d 898 (C.A. 2) and *N.L.R.B.* v. *Firedoor Corp.*, 291 F. 2d 328, cert. den., 368 U.S. 921, are distinguishable from the instant case in that, in those cases, as in *Blue Flash*, the employer's questioning of his employees was for a legitimate purpose. Thus, the interrogation found in those cases to be lawful came after the union had made a direct claim of majority status, and was based on the employer's need to know whether he was obligated to recognize and bargain with the union. Similarly, in *N.L.R.B.* v. *Katz Drug Co.*, 207 F. 2d 168 (C.A. 8), also relied on by petitioner, the employer had a valid purpose for his interrogation, i.e., to prepare for pending litigation.

& Trecker Corp. v. *N.L.R.B.*, 209 F. 2d 782, 786-788 (C.A. 7); *N.L.R.B.* v. *White Construction & Engineering Co.*, 204 F. 2d 950, 953 (C.A. 5). The Board reserves to itself the function of investigating such claims, and in its investigation it endeavors to keep the identity of the employees involved secret from the employer and from other participating labor organizations. It does so both because of its statutory responsibility for investigation of questions concerning representation and, equally significantly, because the disclosure of the identity of the employees involved to other parties tends to destroy the secrecy of the ballot and the integrity of the Board's processes. (R. 21.) Cf. *N.L.R.B.* v. *J. I. Case Co.*, *supra*, at 600, in which this Court indicated that the substantiality of a union's showing of interest is a matter of administrative concern only and warned against "disclosure of the individual employees desires with respect to representation [which] would violate the long-established policy of the secrecy of the employees' choice in such matters." To accept petitioner's argument that, despite the conceded non-litigability of a union's showing of interest, it was here justified in engaging in systematic interrogation of its employees as a means of determining whether an adequate showing of interest had been achieved would be to sanction the very forced disclosure of employee participation in union organizational activity which the non-litigability doctrine is intended to prevent. It would, in sum, be to "permit a rule adopted for [the Board's] own convenience as an administrative expedient to be turned into a procedure

by which an employer can inform itself of the identity of employee leaders of organizational campaigns" (R. 21).[18]

Finally, petitioner's reliance on *Globe Iron Foundry*, 112 NLRB 1200, and *General Shoe Corp.*, 114 NLRB 381, as justifying its investigation of the Union's showing of interest is wholly misplaced. Nothing in those decisions suggests that the employers composed or circulated the statements there involved, much less that they systematically and individually presented those statements to each employee for his signature. The mere fact that the Board, in *Globe Iron Foundry*, paid heed to the information brought to its attention with respect to the showing of interest can in no way be said to privilege an employer to engage in broadside interrogation of its employees based on suspicion or hope that the resultant information will demon-

---

[18] There is no merit to petitioner's assertion that the Board here held interrogation for the purpose of checking the authenticity of a union's showing of interest to be *per se* unlawful. As was previously pointed out, the Board found, in the circumstances presented here, that petitioner's interrogation of its employees was unlawful because of its tendency to interfere with their rights of self-organization. While petitioner sought to justify this interrogation by arguing that its purpose was to check the validity of the Union's showing of interest, the Board rejected this as a defense. Rejection of the defense that interrogation is warranted to investigate compliance with the Board's showing of interest requirement is plainly not the same thing as holding interrogation for this purpose to be *per se* unlawful. Petitioner's attack on the *per se* approach thus has no relevance here.

strate an insufficient showing of interest. Cf. *Lindsay Newspapers, Inc.*, 130 NLRB 680, 692.[19]

---

[19] Petitioner's contention (Brief, p. 61) that the Board's failure to dismiss the Union's representation petition was erroneous and that this Court should order that petition dismissed does not present an issue cognizable by this Court. A determination made by the Board in a representation proceeding is not a "final order" within the meaning of Section 10(e) or (f) of the Act and is not, therefore, directly reviewable by the Courts of Appeals. The only circumstance in which a Court of Appeals may review Board action taken in a representation proceeding under Section 9(c) is when the Board, acting under Section 10(c), issues an unfair labor practice order based "in whole or in part upon the facts certified" as the result of such Section 9(c) proceedings. That not being the case here, the determination of which petitioner complains is not subject to review by this Court. *A.F. of L.* v. *N.L.R.B.*, 308 U.S. 401, 408-412; *N.L.R.B.* v. *I.B.E.W.*, 308 U.S. 413, 414-415; *N.L.R.B.* v. *Falk*, 308 U.S. 453, 458-459; *Timken-Detroit Axle Co.* v. *N.L.R.B.*, 197 F. 2d 512 (C.A. 6); *Bonwit Teller, Inc.* v. *N.L.R.B.*, 197 F. 2d 640, 642, n. 1 (C.A. 2), cert. den., 345 U.S. 905; *N.L.R.B.* v. *LaSalle Steel Co.*, 178 F. 2d 829, 832, n. 1 (C.A. 7).

Petitioner's additional assertion that the Board's decision goes beyond the scope of the complaint and the issues raised therein (Brief, pp. 13-17) is patently frivolous. The complaint alleged that petitioner's interrogation of its employees had been in violation of their Section 7 rights (R. 5), and the Board so found. Those parts of the Board's decision to which petitioner takes exception, primarily the Board's discussion of its showing of interest requirement, were made necessary by petitioner's assertion that "it was justified in conducting interviews for the purpose of showing that [the Union] did not have a proper showing of interest" (R. 20).

CONCLUSION

For the reasons stated, it is respectfully requested that the petition to review and set aside the Board's order be denied, and that a decree should be entered enforcing the Board's order in full.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

JAMES C. PARAS,
STEPHEN B. GOLDBERG,
Attorneys,

National Labor Relations Board.

March, 1963.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

Representatives and Elections

Sec. 9.(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for

collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor

practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in

question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

☆ U. S GOVERNMENT PRINTING OFFICE; 1963 677585 951